

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 LANCE REBERGER,

4 Plaintiff

5 v.

6 JAMES DZURENDA, et al.,

7 Defendants

Case No.: 3:17-cv-00552-RCJ-CSD

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF No. 121

8 This Report and Recommendation is made to the Honorable Robert C. Jones, United
9 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to
10 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

11 Before the court is defendants Slonim's and Meyer's motion for summary judgment, or in
12 the alternative, summary adjudication. (ECF Nos. 121, 121-1, 121-2.) Plaintiff did not oppose
13 this motion.

14 After a thorough review, it is recommended that Slonim's and Meyer's motion be
15 granted.

16 **I. BACKGROUND**

17 Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC),
18 proceeding pro se with this action pursuant to 42 U.S.C. § 1983, the Americans with Disabilities
19 Act (ADA), and section 504 of the Rehabilitation Act (RA). (Compl., ECF No. 15.) The events
20 giving rise to this action took place while Plaintiff was housed at Lovelock Correctional Center
21 (LCC), High Desert State Prison (HDSP), Northern Nevada Correctional Center (NNCC), and
22 Ely State Prison (ESP). (*Id.*) Defendants are: Dr. Aranas, Q. Byrne, Cegavske, Deal, Dzurenda,
23 Gittere, Flores, Laxalt, Meyer, Nash, Sandoval, and Slonim.

1 The court screened Plaintiff's complaint. (ECF No. 14.) First, the court allowed Plaintiff
2 to proceed with claims for violation of Title II of the ADA and section 504 of the RA against
3 Dzurenda, Dr. Aranas, Deal, Filson, Gittere, H. Byrne, Q. Byrne, Flores, Sandoval, Laxalt, and
4 Cegavske. H. Byrne and Filson were subsequently dismissed without prejudice under Federal
5 Rule of Civil Procedure 4(m). (ECF No. 100.) These claims are based on allegations that
6 Plaintiff has a disability—human immunodeficiency virus (HIV)—and he was discriminated
7 against because of his disability when, pursuant to NDOC's Administrative Regulation (AR)
8 610, he was placed in administrative segregation for over 12 years, where he was on lock down
9 for 23 hours a day, seven days a week, and deprived of NDOC's programs, services and benefits.

10 Second, the court allowed Plaintiff to proceed with an Eighth Amendment deliberate
11 indifference to serious medical needs claim against Dzurenda, Dr. Aranas, Slonim, and Meyer.
12 This claim is based on allegations that these Defendants denied him his HIV medications on
13 several occasions due to a contract NDOC has with Renown employees Slonim and Meyer.
14 Under this contract, Plaintiff claims the prison's medical department can only order Plaintiff's
15 HIV medications seven days prior to the medication running out, which is not enough time for
16 the prison to refill his prescription.

17 Third, Plaintiff was allowed to proceed with an Eighth Amendment conditions of
18 confinement claim against Nash based on allegations that during his more than 12 years in
19 administrative segregation at NNCC, ESP and HDSP, the water had high levels of lead and
20 sulfur that was not safe to consume.

21 Finally, Plaintiff was allowed to proceed with an Eighth Amendment claim against
22 Dzurenda, Dr. Aranas, Deal, Sandoval, Cegavske, and Laxalt based on allegations that the more
23

1 than 12 years he spent in administrative segregation were a significant hardship that put Plaintiff
 2 in imminent danger of serious physical and psychological injuries.

3 Defendants Slonim and Meyer move for summary judgment, arguing they were not
 4 deliberately indifferent to Plaintiff's HIV.¹

5 II. LEGAL STANDARD

6 The legal standard governing this motion is well settled: a party is entitled to summary
 7 judgment when "the movant shows that there is no genuine issue as to any material fact and the
 8 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*
 9 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if the
 10 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*
 11 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is "material" if it could affect the outcome
 12 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary
 13 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the
 14 other hand, where reasonable minds could differ on the material facts at issue, summary
 15 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

16 "The purpose of summary judgment is to avoid unnecessary trials when there is no
 17 dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose
 19 of summary judgment is "to isolate and dispose of factually unsupported claims"); *Anderson*, 477
 20 U.S. at 252 (purpose of summary judgment is to determine whether a case "is so one-sided that
 21 one party must prevail as a matter of law"). In considering a motion for summary judgment, all
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23 ¹ The remaining defendants have also moved for summary judgment (ECF No. 120), and the
 court will address that motion in a separate report and recommendation.

1 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*
2 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*
3 *& Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, "if the evidence of the
4 nonmoving party "is not significantly probative, summary judgment may be granted." *Anderson*,
5 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and
6 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
7 *Anderson*, 477 U.S. at 249.

8 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
9 "When the party moving for summary judgment would bear the burden of proof at trial, 'it must
10 come forward with evidence which would entitle it to a directed verdict if the evidence went
11 uncontroverted at trial.' ... In such a case, the moving party has the initial burden of establishing
12 the absence of a genuine [dispute] of fact on each issue material to its case." *C.A.R. Transp.*
13 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
14 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
15 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
16 an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving
17 party cannot establish an element essential to that party's case on which that party will have the
18 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

19 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
20 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
21 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
22 dispute of material fact conclusively in its favor. It is sufficient that "the claimed factual dispute
23 be shown to require a jury or judge to resolve the parties' differing versions of truth at trial."

1 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)
2 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
3 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475
4 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the
5 pleadings and set forth specific facts by producing competent evidence that shows a genuine
6 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

7 **III. DISCUSSION**

8 "The government has an 'obligation to provide medical care for those whom it is
9 punishing by incarceration,' and failure to meet that obligation can constitute an Eighth
10 Amendment violation cognizable under § 1983." *Colwell v. Bannister*, 753 F.3d 1060, 1066 (9th
11 Cir. 2014) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976)).

12 A prisoner can establish an Eighth Amendment violation arising from deficient medical
13 care if he can prove deliberate indifference to a serious medical need. *Estelle*, 429 U.S. at 104. A
14 claim for deliberate indifference involves the examination of two elements: "the seriousness of
15 the prisoner's medical need and the nature of the defendant's response to that need." *McGuckin v.*
16 *Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev'd on other grounds*, *WMX Tech, Inc. v. Miller*,
17 104 F.3d 1133 (9th Cir. 1997).

18 "Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051, 1060
19 (9th Cir. 2004). Deliberate indifference entails something more than medical malpractice or even
20 gross negligence. *Id.* Inadvertence, by itself, is insufficient to establish a cause of action under
21 section 1983. *McGuckin*, 974 F.2d at 1060. Instead, deliberate indifference is only present when
22 a prison official "knows of and disregards an excessive risk to inmate health or safety; the
23 official must both be aware of the facts from which the inference could be drawn that a

1 substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*,
2 511 U.S. 825, 837 (1994); *see also Akhtar*, 698 F.3d at 1213 (citation omitted).

3 Deliberate indifference exists when a defendant "den[ies], delay[s] or intentionally
4 interfere[s] with medical treatment, or it may be shown by the way in which prison officials
5 provide medical care." *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013) (internal
6 quotation marks and citation omitted).

7 NDOC and Renown Regional Medical Center entered into a contract for the provision of
8 HIV/Acquired Immune Deficiency Syndrome (AIDS) specialty health care on site or via
9 telemedicine, and Renown staff providing care would prescribe and dispense drugs from their
10 340B pharmacy directly to the institutions where the inmates are housed. (ECF No. 121-1 at 15.)
11 According to Defendants, the 340B Drug Pricing Program is a United States government
12 program that requires drug manufacturers to provide outpatient drugs to eligible health care
13 organizations and covered entities at significantly reduced prices to improve access to expensive
14 prescription medications for the uninsured and/or vulnerable patients.

15 Carol Meyer, APRN, was trained as an HIV specialty care provider and was an employee
16 of Renown Medical Group from 2013 to 2018, where her time was split providing in-person
17 primary care and telehealth education and telehealth HIV care to NDOC inmates. All NDOC
18 inmates that were diagnosed with HIV received care from her as their HIV specialist and were
19 qualified to receive their prescription drugs for treatment of HIV through Renown's 340B
20 pharmacy. (Meyer Decl., ECF No. 121-2.)

21 Tony Slonim, M.D. was the Chief Executive Officer (CEO) of Renown Regional Medical
22 Center. Slonim did not treat patients in this program, and as such, he did not provide care to
23 Plaintiff. (Meyer Decl. ECF No. 121-2 ¶ 12.)

1 Plaintiff was diagnosed with HIV in 1989, and his treatment started in 1994 with daily
2 dosages of the HIV medications Norvir and Invirase, which Meyer says are now considered an
3 older/outdated or “legacy” treatment plan. Plaintiff was clear he did not want to explore changes
4 in medications despite recommendations for an updated treatment plan. His lab numbers,
5 nevertheless, remained stable. (Meyer Decl., ECF No. 121-2.)

6 Following Nurse Meyer’s telemedicine encounter with an inmate patient, she would write
7 the prescription which was then sent electronically to the Renown pharmacy. The prescription
8 was received and checked for accuracy, and then the order would be packaged and shipped
9 directly to the prison. The order must go through the NDOC pharmacy staff because they are
10 required to sign for the packaged ordered medications as dispensed from Renown pharmacy. The
11 received package order would be rewritten by the NDOC pharmacy or medical staff to match the
12 medication record of the prescription ordered in the patient’s chart. The medication is then
13 dispensed directly from NDOC staff to the inmate. This process can take days due to NDOC
14 policies. (Meyer Decl., ECF No. 121-2.)

15 According to Meyer, on multiple occasions, Plaintiff refused medical care and often was
16 a last minute “no show” to the scheduled telemedicine appointments. Plaintiff told her that when
17 he was at NNCC, prior to being transferred to ESP, his treating physician at NNCC allowed him
18 to keep his HIV medication at bedside, but when he was transferred this privilege was removed,
19 which caused him to complain. Meyer confirms, however, that the policy was always to have the
20 medication dispensed by NDOC medical staff, and not to be possessed by the inmate. (Meyer
21 Decl., ECF No. 121-2.)

22 Plaintiff asked Meyer how she refilled his medications and he told him the process.
23 (Meyer Decl., ECF No. 121-2.)

1 First, Slonim and Meyer provide evidence that Slonim did not provide care to Plaintiff.
 2 There is no evidence in the record that Slonim knew of any delays Plaintiff experienced in
 3 receiving his medications. Plaintiff did not respond to the motion to create a genuine dispute of
 4 material fact on this issue.

5 Second, Meyer refilled Plaintiff's prescriptions after their telemedicine encounters by
 6 sending the prescription to Renown's 340B pharmacy, and the medication was then sent directly
 7 to NDOC to be distributed to Plaintiff. Meyer had no involvement in any delays in Plaintiff
 8 receiving his medication. Again, Plaintiff did not respond to the motion to create a genuine
 9 dispute of fact with respect to his claim against Meyer.

10 There is no evidence that Slonim or Meyer was deliberately indifferent to Plaintiff's
 11 serious medical need; therefore, summary judgment should be granted in their favor.²

12 IV. RECOMMENDATION

13 IT IS HEREBY RECOMMENDED that the District Judge enter an order **GRANTING**
 14 Slonim's and Meyer's motion for summary judgment (ECF No. 121).

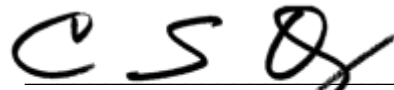
15 The parties should be aware of the following:

16 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
 17 this Report and Recommendation within fourteen days of being served with a copy of the Report
 18 and Recommendation. These objections should be titled "Objections to Magistrate Judge's
 19 Report and Recommendation" and should be accompanied by points and authorities for
 20 consideration by the district judge.

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 22 ² Slonim and Meyer do not argue they are not state actors under section 1983, presumably, this is
 23 because Renown contracted with NDOC to provide this medical care to inmates. *See West v.*
Atkins, 487 U.S. 42 (1988) (physician under contract with state to provide medical services to
 inmates at state prison hospital acted under color of state law).

1 2. That this Report and Recommendation is not an appealable order and that any notice of
2 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
3 until entry of judgment by the district court.

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5 Dated: October 19, 2022

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7 Craig S. Denney
8 United States Magistrate Judge
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